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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

DALE FARRAR and PAT SMITH,
as Co-Administrators of the Estate of
Joseph D. Farrar, Deceased,
Petitioners,

vs.

WILLIAM P. HOBBY, JR.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF OF AMICI CURIAE OF AMERICANS
FOR EFFECTIVE LAW ENFORCEMENT, INC.,
JOINED BY THE INTERNATIONAL ASSOCIATION
OF CHIEFS OF POLICE, INC.
IN SUPPORT OF RESPONDENT.**

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CONSENT OF PARTIES

Counsel have requested consent of the parties. Consent was received by both parties and filed with the Clerk of this Court.

INTEREST OF AMICI

Americans for Effective Law Enforcement, Inc. (AELE), is a national not-for-profit citizens organization. AELE is interested in establishing a body of law making the law enforcement effort more effective, in a constitutional manner. It seeks to improve the operation of the law enforcement function to protect our citizens in their life, liberty and property, within the framework of the various State and Federal Constitutions. AELE has previously appeared as amicus

curiae over eighty times in the Supreme Court of the United States and over thirty-six times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio, and Missouri.

The International Association of Chiefs of Police, Inc., (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 72 nations. Through its programs of training, publications, legislative reform, and amicus curiae advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

SUMMARY OF ARGUMENT

A plaintiff, in an action brought under 42 U.S.C. § 1983, whose sole recovery is one dollar in nominal damages has not obtained a material alteration of the legal relationship of the parties and should not be entitled to an award of attorneys' fees pursuant to 42 U.S.C. § 1988.

Nominal damages are often awarded under § 1983 in circumstances in which the plaintiff has not sustained any damages or injury and the defendant has not intentionally infringed important constitutional rights. A manifest injustice to the defendant results if the defendant is forced to pay § 1988 attorneys' fees to plaintiff, in addition to defendant's own litigation

expenses, despite the defendant's apparent victory. Denial of fees in the instant case, and similar cases, would not defeat the important goals underlying §§ 1983 and 1988 of the compensating and providing counsel for plaintiffs injured by violations of their constitutional rights by defendants acting under color of law.

To qualify for "prevailing party" status, a plaintiff must serve the role of "private attorney general" intended by Congress in enacting § 1988. Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782, 793, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989). Fee recovery should be limited to those plaintiffs who obtain compensatory damages or receive another material alteration of the legal

relationship between the parties.

ARGUMENT

I.

PETITIONER IS NOT A PREVAILING PARTY ENTITLED TO ATTORNEY'S FEES PURSUANT TO 42 U.S.C. SECTION 1988.

The Court below held a plaintiff is not entitled to attorney's fees pursuant to 42 U.S.C. Section 1988 when the sole relief sought in a 42 U.S.C. 1983 action is monetary damages and plaintiff is awarded only one dollar in nominal damages. Farrar v. Hobby, 941 F.2d 1311 (5th Cir. 1991). Relying upon this Court's decisions in Hewitt v. Helms, 482 U.S. 755, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987), Rhodes v. Stewart, 488 U.S. 1, 109 S.Ct. 202, 102 L.Ed.2d 1 (1988) (per curiam), and Texas State Teacher's Association v. Garland

Independent School District, 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989), the Court stated that a plaintiff must establish that plaintiff won "at least some relief from the defendant, that the outcome of the suit changed the legal relationship between the parties, and that the plaintiff's success was not de minimis or technical victory." Farrar, 941 F.2d at 315.

The Fifth Circuit's decision should be affirmed because it correctly interpreted and followed precedent established by this Court. This Court stated:

[A]t a minimum to be considered a prevailing party within the meaning of Section 1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant . . . a technical victory may be so insignificant . . . as to be

insufficient to support prevailing party status . . . [w]here the plaintiff's success on a legal claim can be characterized as purely technical or de minimis, a district court would be justified in concluding that even the 'generous formulation' we adopt today has not been satisfied. . . . The touchstone under prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.

Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782, 792-93, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989) (emphasis added) [citations omitted] .

In Farrar, no material change in the legal relationship resulted. The jury found that Hobby did not proximately cause Farrar's injury. The one dollar award does not alter the legal relationship between the parties.

No award could be more de minimis.

II.

ATTORNEYS' FEES SHOULD NOT BE AWARDED TO A PLAINTIFF WHO DID NOT SUSTAIN A CONSTITUTIONAL INJURY PROXIMATELY AND INTENTIONALLY CAUSED BY DEFENDANT.

The imposition of attorneys' fees pursuant to Section 1988 in cases where either the defendant did not intentionally or proximately cause the plaintiff's constitutional injuries would have a detrimental impact on law enforcement. Although the decision in Farrar v. Hobby does not directly relate to law enforcement, the decision will affect Section 1983 suits brought against law enforcement and municipalities they serve.

In Farrar, plaintiff alleged then-Lieutenant-Governor William Hobby was partly involved in events which led to

the closing of Artesia Hall, a facility for teenagers operated by Farrar. The jury found Hobby did not engage in a conspiracy against the plaintiffs and his actions were not the proximate cause of plaintiff's injury. Thus, no evidence established that Hobby's actions caused a deprivation of plaintiffs' constitutional rights. Hobby acted within his discretion as Lieutenant-Governor.

The issue whether a plaintiff is entitled to attorneys' fees pursuant to § 1988 where plaintiff's sole recovery is nominal damages has been treated differently by the various Court of Appeals. An analysis of two cases, Lewis v. Kendrick, 944 F.2d 949 (1st Cir. 1991), and Romberg v. Nichols, 953 F.2d 1152 (9th Cir. 1991), and Romberg

v. Nichols, 953 F.2d 1152 (9th Cir. 1992) illustrates this point.

The court denied recovery of attorneys' fees in Lewis v. Kendrick, 944 F.2d 949 (1st Cir. 1991). Police officers believed a call from a neighbor that the plaintiff threatened the neighbor with a knife. The case involved a fifteen minute investigation by officers, plaintiff's arrest, and incarceration of less than two hours. Id. at 951. The Court stated that the case was a "blow up of a routine street arrest on a citizen's call." Id. at 958. The court stated, "[t]o turn a single wrongful arrest into a half year's work, and seek payment therefor, with costs, amounting to 140 times the worth of the injury, is, to use a benign word, inexcusable." Id. at 956.

In comparison, the Ninth Circuit's recent decision in Romberg v. Nichols, 953 F.2d 1152 (9th Cir. 1992), is illustrative of the manifest injustice in imposing \$ 1988 fees against a police department or its officers where the officer's act in subjective good faith and only nominal damages are awarded. In Romberg, police officers believed their entry into the Romberg's apartment was justifiable to save Mrs. Romberg from serious harm. Id. at 1154. At trial, only \$1.00 in nominal damages of the \$2 million sought in the complaint were awarded to plaintiffs. Id. at 1154-55. However, the Ninth Circuit upheld the award of attorneys' fees against the officers.

The division in the Circuits necessitates a definitive decision by

this Court on this issue. A decision in favor of Petitioner would only serve to encourage attorneys solely in pursuit of their own fee recovery to bring actions not involving important constitutional rights and not involving an injured plaintiff where the only possible recovery for a plaintiff is \$1.00 in nominal damages. Counsel would be able to recover exorbitant fees.¹ The underlying purpose of § 1988 is to enable injured plaintiffs to obtain counsel and not "to enable counsel to obtain munificent fees". Lewis, supra, at 956.

¹ Plaintiffs in § 1983 actions brought against municipalities for actions by their law enforcement agencies often request hourly rates in the range of \$250.00 to \$300.00 per hour and further request a multiplier of that amount.

A. An Award of Attorneys' Fees Would Unjustly Punish Respondent and Would not Deter Future Violations of Constitutional Rights.

This court in Carey v. Piphus, 435 U.S. 247, 257, n.11, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978), recognized that an award of attorneys' fees pursuant to § 1988 "provides additional- and by no means inconsequential- assurance that the agents of the State will not deliberately ignore due process rights". (emphasis added). However, this decision does not mandate a fee award in this case. A fee award would not serve to deter any future unconstitutional behavior.

The decision in Carey established to receive compensatory damages in a Section 1983 action, the plaintiff must sustain actual injuries caused by the deprivation of constitutional rights..

Absent actual injury, only nominal damages may be awarded. Id. at 266. "[T]he basic purpose of a Section 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights" Id. at 254.

In the law enforcement arena, officers may negligently or unintentionally cause a constitutional deprivation which may give rise to a nominal damage award or one dollar jury verdict, even though the officers and the law enforcement agency did not deliberately intend to violate an individual's rights. These situations may arise in a variety of contexts, including responding to apparent life threatening situations as in Lewis and Romberg, executing a search warrant, or

stopping and detaining a suspect. An award of attorneys' fees would not deter any future deprivation of constitutional rights in these situations. Simply stated, an award of attorneys' fees would unnecessarily punish the municipality, and its taxpayers who ultimately bear the burden of the cost, for conduct which the officer believed was reasonable.

B. Denial of Attorneys' Fees Would Not Undermine the Purpose of § 1983.

Affirming the Fifth Circuit's decision in Farrar will not dilute the significance of this Court's recent opinion in Hudson v. McMillian, ___ U.S. ___, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992). This Court held that use of excessive force against a prisoner which does not result in a significant injury

may constitute cruel and unusual punishment and support a claim under 42 U.S.C. Section 1983.²

The Fifth Circuit's decision in Hudson applied a "significant injury" requirement before plaintiff can recover under 42 U.S.C. Section 1983. This Court reversed the Fifth Circuit and found the extent of the plaintiff's injury provides no basis for dismissal of a Section 1983 claim. The Court found Hudson's injuries, including bruises, swelling, loosened teeth and a cracked dental plate, "are not de minimis for Eighth Amendment purposes." Id. at 1000. This Court in Hudson, indicated its intolerance for police or

² AELE and the Department of Justice submitted an amicus brief in Hudson v. McMillian in support of the inmate plaintiff.

correctional officers brutality. However, Hudson involved intentional brutality causing actual injury which would support an award of attorneys' fees.

The Fifth Circuit in Farrar emphasized their holding denying attorney's fees will not undermine the importance of finding a constitutional violation. 941 F.2d at 1315. Instead, the Court found the sole object of plaintiff's suit was to recover monetary damages and recovery of merely one dollar does not support "prevailing party" status under Section 1988. Id. at 1315. Actions done within a governmental official's discretion in subjective good faith with no intent to cause a constitutional deprivation should not support a fee award under

§ 1988 where the plaintiff is only entitled to and receives nominal damages.

CONCLUSION

Accordingly, Amici respectfully request this Court affirm the decision of the Court below and hold that a plaintiff in a 42 U.S.C. § 1983 who recovers only nominal damages is not entitled to "prevailing party" status to recover attorneys' fees under 42 U.S.C. § 1988.

Date: June 12, 1992

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